

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

March 10, 2005

GSBCA 16538-RELO

In the Matter of RICHARD H. WHITTIER

Richard H. Whittier, FPO Area Pacific, Claimant.

R. A. Manese, Human Resources Office - Yokosuka, Commander, United States Naval Forces, Japan, appearing for Department of the Navy.

DANIELS, Board Judge (Chairman).

Richard H. Whittier, an employee of the Department of the Navy, challenges the determination of his agency with regard to payment of a temporary quarters subsistence allowance (TQSA). We hold that the agency's determination was correct in part and incorrect in part, and that Mr. Whittier is owed a greater TQSA than the one that was paid.

Background

On April 18, 2004, Mr. Whittier was transferred from Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan, to Sasebo Naval Base, Japan. In conjunction with this move, the Navy authorized payment of a TQSA for as many as ninety days. The Navy understood that Mr. Whittier's wife and daughter would remain on Okinawa for several weeks – until the end of the daughter's school year – and would join him at Sasebo by June 14.

Because the family would not arrive until June, the Navy arranged for the Whittiers to move into a Government-furnished house at Sasebo at that time. Meanwhile, Mr. Whittier lived in temporary quarters at Sasebo and his wife and daughter remained in the Government-furnished house on Okinawa where they had been residing while Mr. Whittier was stationed there.

On May 27, Mr. Whittier took annual leave from his position at Sasebo and returned to Okinawa to help his wife and daughter pack household goods and otherwise prepare to move. He stayed on Okinawa until June 12, when the entire family traveled to Sasebo. They moved into Government-furnished housing at Sasebo on June 14.

The Navy paid Mr. Whittier a TQSA for himself for the period from April 18 – when he left Okinawa – until May 27 – when he went on leave. The agency declined to pay a TQSA for his wife and daughter, on the belief that they resided in permanent quarters at all times relevant to the matter.

Mr. Whittier notes that the house in which he and his family lived on Okinawa was provided free of charge until April 18, when he left for Okinawa. For the period of time from April 18 until the family left for Sasebo, the Government charged \$7486.78 for use of the house. The Navy maintains that this payment "constituted a monetary 'penalty' imposed upon [Mr. Whittier] for not vacating his MFH [military family housing], rather than a negotiated rental contract between Air Force and [the employee] to pay an agreed-upon amount as rent." It is clear that the amount was not agreed-upon in advance, for the Government did not propose a rental agreement and did not tell Mr. Whittier that he would have to make any payment until shortly before his family left the house. The Navy has provided no support for its position that the amount was a monetary penalty, however. The cash collection voucher for this matter states plainly, "rental payment."

Discussion

In the Overseas Differentials and Allowances Act, Congress provided that "[w]hen Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more . . . quarters allowances may be granted when applicable." Among the quarters allowances are "[a] temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family." This allowance may be granted for two different periods – "for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter," and "for a period of not more than 30 days immediately before final departure from [a] post after the necessary evacuation of residence quarters."¹ The other two quarters allowances are a "living quarters allowance for rent, heat, light, fuel, gas, electricity, and water" and, "[u]nder unusual circumstances," payment or reimbursement for "repairs, alterations, and improvements to the privately leased residence of an employee." 5 U.S.C. § 5923(a) (2000).

The President has delegated to the Secretary of State authority to issue regulations which implement the Overseas Differentials and Allowances Act. The Department of State Standardized Regulations (DSSR) contain these regulations. *Samuel C. Stringer*, GSBCA 16369-RELO, 04-2 BCA ¶ 32,731; *Albert Carter, Jr.*, GSBCA 15435-RELO, 01-1 BCA ¶ 31,404; *Okyon Kim Ybarra*, GSBCA 15407-RELO, 01-1 BCA ¶ 31,334. The DSSR explain, with regard to quarters allowances generally, that "[t]he quarters allowance is intended to reimburse an employee for substantially all costs for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not provided to the employee without charge." DSSR 112.

¹Each period may "be extended for not more than 60 additional days if the head of the agency concerned or his designee determines that there are compelling reasons beyond the control of the employee for the continued occupancy of temporary quarters." 5 U.S.C. § 5923(b) (2000).

TQSA is covered by sections 120 through 129 of the DSSR. Generally, TQSA begins when an employee arrives at a new post. DSSR 123. It may also be paid "preceding final departure" from a post, "[i]f the head of agency determines that it is necessary for an employee to occupy temporary quarters" during that period. TQSA for such a period may begin on "the date following the necessary vacating of government owned or leased quarters or termination of the living quarters allowance grant." DSSR 124.1. In that situation, the allowance ends on the earliest of (a) the thirty-first day after the grant begins (or such later date, up to an additional sixty days, as the head of the agency permits); (b) "the date expenses for temporary lodging are no longer incurred"; or (c) "the date of the employee's departure, or the date of departure of family members if later, under transfer orders." DSSR 124.2. The Defense Department's Joint Travel Regulations (JTR) specifically make these DSSR provisions applicable to Defense Department employees. JTR C1003 (Apr. 2004).

The import of the statute and regulations is that generally, if the Government sends an employee to a post of duty abroad, it shall pay for the employee's housing. Payment may be through the provision of Government quarters without charge or through a quarters allowance, of which TQSA is one variety. Once Mr. Whittier left Okinawa, the Government began charging for the continued occupancy by his wife and daughter of the house in which they had been living without charge. With regard to the analogous allowance of temporary quarters subsistence expenses for employees transferred within the United States, we have determined that a material change in the financial arrangements for the costs of housing at an employee's old duty station, resulting from a transfer, can make that housing "temporary" although it was once "permanent." (The usual situation is the sale and lease back of the residence.) *Thomas R. Montgomery*, GSBCA 14888-RELO, 99-2 BCA ¶ 30,427 (citing *George S. Chaconas*, GSBCA 14278-RELO, 98-1 BCA ¶ 29,728); *see also Daniel E. Vargas*, GSBCA 03-1 BCA ¶ 32,145 (2002). Because the two allowances have similar purposes, we have in the past applied principles from one to situations involving the other. *Stringer* (TQSE principles applied to TQSA situation); *Floyd S. Wiginton*, GSBCA 15583-RELO, 01-2 BCA ¶ 31,605 (TQSA principles applied to TQSE situation). Applying the TQSE rule regarding material change in financial arrangements for housing costs to a TQSA situation, we conclude that by making a significant charge for housing which was previously provided without charge, the Government transformed the Whittier residence on Okinawa into temporary lodging.

Having reached this conclusion, we hold that the Navy is obligated to pay TQSA for Mr. Whittier's wife and daughter for at least the first thirty days in which they remained on Okinawa after Mr. Whittier reported to his new duty station at Sasebo. Whether this thirty-day period should be extended to the remainder of their time on Okinawa is within the discretion of the Secretary of the Navy or his designee. If that official determines that there were compelling reasons beyond the control of Mr. Whittier for the continued occupancy of the residence, the period may be extended. We note in this regard that taking into consideration the impact of a move on a girl in high school, the Public Works Officer and Commander of Fleet Activities Sasebo both endorsed Mr. Whittier's request that his family

be allowed to stay in the house until his daughter had finished her school year. The record does not show what happened to the request when it was forwarded to a higher level.²

The Navy was correct, however, in refusing to pay Mr. Whittier the TQSA he requested for himself for the period of time during which he was on annual leave. The DSSR does not speak directly to the question of whether an employee is eligible for TQSA while he is on annual leave. Consistent with our practice of applying TQSE principles to TQSA situations to the greatest extent possible, however, we hold that employees on annual leave are not eligible for TQSA. See *Elmer L. Grafford*, GSBCA 14176-RELO, 98-1 BCA ¶ 29,700. We see no reason, though, why Mr. Whittier's personal ineligibility during this period should affect the eligibility of his wife and daughter. Except for the circumstances in which one member of a family moves into permanent quarters, ending eligibility of all family members for a temporary quarters benefit, it is entirely possible for a dependent to be eligible for TQSE while an employee is not. *Alfred J. Costanzo*, GSBCA 13718-RELO, 97-1 BCA ¶ 28,872.

STEPHEN M. DANIELS
Board Judge

²The Navy has suggested that TQSA is not available for Mr. Whittier's wife and daughter because, among other reasons, they rented their residence from the Government, rather than a private company or individual. We see no provision in the DSSR which limits eligibility in this way. We also note that the agency's argument is contrary to the position it takes with regard to the employee's own eligibility for TQSA. While in Sasebo in April and May, Mr. Whittier rented temporary quarters for some of the time from a Navy non-appropriated fund instrumentality and for some of the time from the Navy itself. The agency properly considered Mr. Whittier eligible for TQSA and repaid him for the lodging expenses he incurred from these entities.